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No. 08-246

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In The
Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,

Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND INDIANA MICHIGAN POWER COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Michigan law requires that electric utilities, such as Respondent Indiana Michigan Power Company (I&M), file annual Power Supply Cost Recovery (PSCR) cases before the Michigan Public Service Commission (MPSC). The MPSC approves the utility's recovery of its costs for purchasing and generating electricity, to the extent that those costs are reasonable and prudent. One of I&M's costs is the payment of spent nuclear fuel (SNF) fees to the Department of Energy (DOE) for the disposal of SNF from its nuclear plant.

Against this backdrop, the question presented is:

Whether the MPSC opinion and order, that allowed I&M to recover the SNF fee costs under Michigan's PSCR law, based on a finding that it was reasonable and prudent for I&M to continue payment of SNF fees to avoid risking severe consequences, such as the loss of its license to operate its nuclear plant, presents a question of federal preemption such that this Court should grant the Petition for a Writ of Certiorari.

RULE 29.6 DISCLOSURE STATEMENT

Indiana Michigan Power Company is wholly-owned by American Electric Power Company, Inc. American Electric Power Company, Inc.'s stock is publicly-traded.

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INTRODUCTION

The Petition presents no sound basis for this Court to exercise jurisdiction. The Petition is based entirely on an alleged federal preemption issue that neither the Michigan Public Service Commission (MPSC) nor the Michigan Court of Appeals decided. The MPSC and Michigan Court of Appeals properly applied Michigan law to the facts of this case and did not decide any federal question – let alone an important one that would merit this Court's review.

In an effort to make a case otherwise, Petitioner fashions new versions of the MPSC and Michigan Court of Appeals decisions to self-create a federal question. But Petitioner does so based on remarkable misstatements of fact and law, which bear no resemblance to what was actually decided. Petitioner disregards the simple fact that the MPSC and Michigan Court of Appeals decided the question of recovery of spent nuclear fuel (SNF) fee costs in Respondent Indiana Michigan Power Company's (I&M) utility rates on the basis of *state law*. Neither the agency nor the Court decided the case on the basis of federal preemption concerning utility payment of SNF fees.

For example, Petitioner contends that the MPSC and Michigan Court of Appeals decisions contradict decisions of this Court and other federal courts by erroneously holding that the SNF fee is mandated by 42 U.S.C. §10222, and disregarding the reciprocal obligation between payment of the fee in exchange for the Department of Energy (DOE) commencing

disposal of SNF by January 31, 1998. Petitioner contends that because the DOE has breached its disposal obligation, utilities are no longer obligated to pay the SNF fee; and therefore the MPSC should have found I&M to be unreasonable and imprudent in continuing to pay the fee. Petitioner contends the MPSC and Court of Appeals found that federal law preempted the disallowance of cost recovery and other "remedies" Petitioner sought. These supposed errors finding federal preemption are said to have significant national importance and to have improperly constrained the MPSC's ratemaking authority.

In reality, and as revealed by an accurate review of this case, there is no question of federal preemption that was decided below, nor is one appropriately presented for review (in the first instance) by this Court. The decisions below were decided properly – and only – based on the evidentiary record and state law. The MPSC and Court of Appeals did make statements concerning the SNF fee being mandated by 42 U.S.C. §10222, but there is no merit in Petitioner's attempt to read those statements out of context. Those statements are part of a complete analysis concerning the risks and consequences that I&M would face (such as the loss of its license to operate its nuclear plant) if it were to stop paying the SNF fee based on Petitioner's legal theory that I&M does not really have to pay the fee. The MPSC and the Court observed that Petitioner's theory is contrary to plain statutory language, and based their decisions on the record, which included qualified

expert and factual testimony[1] that (1) the Nuclear Waste Policy Act of 1982, 42 U.S.C. §10101 *et seq.* (NWPA) established that the Federal government would provide for the permanent disposal of SNF, (2) the DOE entered into standard contracts for the disposal of SNF, which standard contracts provide for a fee to be paid by utilities generating SNF, (3) I&M had no practical alternative other than to sign the standard contract, and (4) under the terms of the standard contract, I&M's late payment or nonpayment creates the risk of interest charges, contract suspension, loss of priority when DOE starts taking SNF for disposal, and adverse consequences for maintaining or renewing I&M's nuclear plant operating license. The MPSC found that it was reasonable and prudent based on the record and under Michigan law, for I&M to continue paying SNF fees in light of

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[1] At page 3 of its Petition, Petitioner claims that it has consistently presented substantial expert evidence and briefing demonstrating that utilities have failed to carry their burden to establish reasonableness and prudence. Later, Petitioner repeats its claim that the testimony of I&M's witness is improper legal opinion. Both of these claims were rejected by the Administrative Law Judge who presided over the evidentiary hearings, and by the MPSC. These evidentiary claims were unavailing when also made to the Michigan Court of Appeals and the Michigan Supreme Court. The Petitioner's stubborn but misguided assertions concerning evidence now made to this Court merely reflect Petitioner's refusal to accept the fact that the proper authorities considered and weighed the evidence, and found I&M's evidence to be more compelling than the evidence of Petitioner's witness. As such, these claims present no justification for this Court to exercise jurisdiction.

the risks of nonpayment. The MPSC did not decide its authority to disallow SNF fees was federally preempted.[2] The Michigan Court of Appeals recognized that the MPSC did not decide the question of federal preemption, and similarly declined to decide it (13a, n 5: "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption").

Petitioner's claim that this case has national significance is misguided. This case is and has been one of Michigan law with no question of federal law decided. Petitioner's misstatements regarding the record and the decisions below, which form the basis of Petitioner's request, are erroneous and no major lingering preemption issue is faced or need be resolved here.

A key issue in a Michigan PSCR plan case is whether the utility's PSCR plan is reasonable and prudent. Petitioner merely wishes to substitute its judgment concerning what is "reasonable and prudent" for that of the MPSC – essentially that I&M should stop paying the SNF fee based on Petitioner's legal theory, instead of paying the fee and thereby avoiding the risks of severe consequences, as demonstrated on

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[2] In fact, at one point in its argument Petitioner asserted that the MPSC lacks the ability to make such determination because as a state agency it may not decide Constitutional questions.

the record. Based on a full and complete evidentiary record, the MPSC determined that I&M's 2004 PSCR plan was reasonable and prudent (37a). This case has been properly decided by the MPSC, and the MPSC's decision was affirmed by the Michigan Court of Appeals based on Michigan law. There is no merit in Petitioner's attempt to elicit this Court's assistance by crafting a federal question when one is not present. There is no significant public interest issue at stake here, aside from the false apparition of preemption that Petitioner insists hangs over this case.

The only confusion and uncertainty which arises from the decisions below is that artificially created by Petitioner's misstatements. This Court's decisions and those of other federal courts are not implicated. The safeguards and policy questions Petitioner wishes answered are not ripe in this case.

None of the criteria warranting this Court's review are present, so the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

I. BACKGROUND AND SUMMARY OF THE DECISIONS BELOW.

I&M owns and operates the Donald C. Cook Nuclear Generating Plant, which supplies electricity to Michigan customers. In 1983, I&M entered into a standard contract with the DOE, in accordance with NWPA. Under the contract, I&M pays a fee to the

DOE in support of a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. SNF disposal did not begin as scheduled, but the DOE maintains that it will begin eventually. For purposes of ratemaking in Michigan, I&M's SNF fee is classified as a nuclear fuel expense and is included as a power supply cost reflected in I&M's PSCR plan.

Michigan law provides for PSCR plans. MCL 460.6j, added by 1982 PA 304 ("Act 304"), authorizes the MPSC to include a PSCR clause in a utility's rate schedule. A PSCR clause allows a utility to charge customers for the anticipated costs associated with the supply of power. Annually, a utility files a PSCR plan. See MCL 460.6j(3). The MPSC may approve, disapprove, or modify the proposed PSCR plan. The Petition arises from the MPSC approval of I&M's 2004 PSCR plan, which the Michigan Court of Appeals affirmed.[3]

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[3] Petitioner also references a number of other cases, which are irrelevant because Petitioner does not seek review of those cases. Petitioner's description of those cases is also misleading because it is inaccurate and incomplete. Notwithstanding Supreme Court Rule 15.2, I&M declines to burden the Court with a lengthy recitation of corrections to Petitioner's countless (and ultimately irrelevant) misstatements about other decisions, which speak for themselves and reveal Petitioner's inaccuracies. For example, Petitioner complains that the MPSC dismissed its generic complaint in Case No. U-13771, and suggests that it has no forum to present is position (Petition, p 17, n 10 and p 25) but review of the MPSC's decision reveals that the MPSC dismissed

(Continued on following page)

On September 30, 2003, I&M filed an application and supporting materials for MPSC approval of its PSCR plan and factors for the 12 months ending December 2004. On November 25, 2003, Petitioner was permitted to intervene.

An evidentiary hearing was conducted on March 10, 2004, during which I&M offered testimony from five witnesses, and Petitioner presented testimony from one witness. The resultant record consists of 252 pages of transcript and 32 exhibits, 30 of which were received into evidence.

Petitioner made its direct case through the testimony of Ronald C. Callen, a consultant. Mr. Callen testified that although utilities with nuclear plants have long been required to contribute funds to the DOE for construction of a national SNF repository, little progress has been made toward opening such a facility. He further testified that, as a result, utilities like I&M are bearing the cost of storing SNF on site while concurrently paying for federal disposal facilities that have not yet begun to accept SNF.

Mr. Callen stated, in his opinion, insufficient support existed for including as part of I&M's 2004 PSCR factors, the DOE's one mill per kilowatt-hour (kWh) SNF disposal fee. He concluded that I&M had not been reasonable and prudent regarding its

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the complaint, without prejudice, due to the failure to even state a *prima facie* case (591a).

ongoing payment of the fee because it failed to "undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protections of the amounts" provided to the DOE in response to those SNF-related assessments.

In rebuttal, I&M presented Douglas H. Malin, Manager of its Nuclear Fuel Section, who addressed I&M's payment of SNF fees and actions with respect to the DOE contract:

> "The standard contract with the DOE is also embodied in 10 CFR, Part 961. Any late payment or nonpayment would result in interest charges and possible contract suspensions and not relieve I&M's obligation to make payment of required fees. Clearly, **I&M is obligated to make payments to the DOE** for post-April 7, 1983 SNF fees **or run the risk of severe consequences**."

Mr. Malin also elaborated on cross-examination by Petitioner's counsel:

> "I can't speak to Mr. Callen's testimony. With respect to this rebuttal document, there is what is known as a viability assessment, it's performed by the Nuclear Regulatory Commission – I don't know chapter and verse, statutes, et cetera – but essentially it says, **if you do not have a place to put your spent nuclear fuel, you do not have, or will not have a license to operate a facility that brings electricity to the community.**

"To date, the only acceptable source to permanently store nuclear fuel as part of this viability assessment, is the Department of Energy; there are no other facilities, and this is what is accepted by the Nuclear Regulatory Commission.

"Q. But you are trying to rebut Mr. Callen's testimony. Would you agree that Mr. Callen has not suggested anywhere that you should not have signed the standard contract?

"A. I can't speak to Mr. Callen's opinion, the point being that later on in this answer, we talk – page 3, line 2, illustrates that the government has this responsibility, all the utilities entered into contract, everyone had to sign later that contract is in 10 CFR, Part 961, I think that's the law, **we don't want to make late payments because it would result in interest charges. DOE could suspend the contract, it wouldn't relieve us of the obligation and we would run the risk of severe consequences and that includes the viability determination by the Nuclear Regulatory Commission, the continuance of our operating license and the operation and benefit of the facility,** that's why I answered the question this way."

Mr. Malin also explained the consequences of nonpayment of SNF fees:

"I recall some parts of his testimony which involve not paying fees to the Department of Energy which would be in violation of our

> contract; **it would add nonpayment and interest charges, increasing the costs to the customer**, and it **would risk suspension of the contract**. The contract is very clear." (Emphasis added).

On April 28, 2005, the MPSC approved I&M's 2004 PSCR plan. Nowhere in its decision did the MPSC find that its authority to disallow SNF costs was federally preempted. Instead, the MPSC applied Michigan law to the facts established in the evidentiary record, and concluded:

> "AEP entered into a 'Standard Contract' with the DOE for disposal of SNF. The contract requires SNF storage fee payments to the DOE of 1 mill for each kWh of electricity generated and sold by a nuclear-fueled generating facility. As consideration for the payment received, the DOE was to provide a site for SNF storage by January 31, 1998. The DOE defaulted on its obligation under the contract when it did not provide a place for SNF storage by January 31, 1998. In spite of the DOE's default, I&M continues its payment of SNF fees. I&M included SNF fees of $2,312,250 in its 2004 PSCR costs.
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> * * *
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> **"The Commission concludes that I&M has not acted unreasonably or imprudently in its handling of SNF payments. In so doing, the Commission rejects all of MEC/PIRGIM's arguments to the contrary. Nothing in this record persuades**

the Commission that I&M should unilaterally cease its payment of SNF fees to the DOE at this time. To do so might risk consequences, such as the imposition of interest payments levied on unpaid SNF amounts due or suspension of the standard contract, which might mean that I&M may not be able to store SNF at the DOE's repository if it is ever built. A failure to have access to a repository that stores SNF could result in a finding by the NRC that I&M's nuclear plant is not 'viable', and could result in the NRC's nonrenewal of I&M's nuclear power plant license. Obviously, if the NRC does not renew I&M's nuclear power plant license, the utility's ability to provide electricity to its customers would be affected. These types of actions must be more fully examined, preferably in a generic proceeding, to access the risk to the utility, its ratepayers, and the general public.

"**The Commission also disagrees with MEC/PIRGIM's contention that PSCR customers are not responsible for payment of SNF fees.** Act 304 governs the recovery of power supply costs from utility customers. Section 6j(1)(a) of Act 304 allows a utility with a PSCR clause to recover from its customers 'booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility

incurred under reasonable and prudent policies and practices.' MCL 460.6j(1)(a). SNF fees are expenses that result from disposal of nuclear fuel rods that have been used to generate electricity. **Because PSCR costs include disposal costs, and because there has been no showing of unreasonableness and imprudence in I&M's incurrence of SNF fees, the Commission finds that SNF fees are recoverable from its PSCR customers.**

"**Further, the Commission finds that, contrary to MEC/PIRGIM's assertions, the record shows adequate court actions by I&M to address the DOE's default on its obligation to take possession of SNF.** I&M established through federal court litigation that DOE has an unconditional obligation to dispose of SNF. *See, Indiana Michigan Power Co v. Dept of Energy*, 88 F.3d 1272 (1996). After the 1996 court ruling, the DOE informed the parties that it would not accept SNF by January 31, 1998. After being informed of the DOE's refusal to accept SNF, another affected utility sought a writ of mandamus. The Court of Appeals denied in part the writ, and held that the standard contract provided damages as a remedy for the DOE's default. *See, Northern States Power v. Dept of Energy*, 128 F.3d 754 (1997). I&M says that in *Northern States Power*, equitable remedies were denied because the Court found that contract damages were an available remedy for the DOE's default on its obligation under the Standard Contract.

> I&M also says that in *Northern States Power II v. Dept of Energy*, 224 F.3d 1361 (2000) and *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336 (2000), the United States Court of Appeals confirmed that seeking contract damages should be the utility's first response to the DOE's default on its obligation to take possession of SNF. **Because the court actions taken by I&M and other utilities are deemed adequate, no finding of unreasonableness and imprudence can be found based on a failure to seek judicial relief.**" (35a, 37a-39a, emphasis added).

On May 31, 2005, Petitioner petitioned for rehearing, arguing that the evidentiary record did not support a finding of reasonableness and prudence. On August 1, 2005, the MPSC denied Petitioner's request (22a). In so doing, the MPSC did not, as Petitioner misstates, adopt I&M's federal preemption arguments.[4] Instead, the MPSC found that the Petitioner simply rehashed its arguments previously considered by the MPSC, and therefore failed to satisfy the rules for rehearing. Far from adopting I&M's position or finding federal preemption, as Petitioner misstates on

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[4] On page 17 of its Petition, Petitioner misleadingly quotes from that section of the MPSC Order labeled "Position of the Parties". That section of the MPSC order summarizes the positions of the parties and is not the MPSC's decision nor is it an adoption of the parties' positions. In proper context, it is clear that the MPSC order denied rehearing because Petitioner was merely rearguing its position.

page 17 of its Petition, the MPSC rejected the petition for rehearing under well-established procedure because:

> "MEC/PIRGIM makes no effort whatsoever to present new evidence or even a new argument. MEC/PIRGIM cite no change in fact or law. Every substantive argument made by MEC/PIRGIM in their petition was made in their initial brief, and many of them were repeated thereafter in their reply brief, exceptions and replies to exceptions. MEC/PIRGIM make no convincing claim of error. The Commission finds that MEC/PIRGIM's petition demonstrates no grounds for reopening or rehearing and denies the petition." (22a.)

Petitioner appealed and claimed that for numerous reasons the MPSC should have disallowed recovery of the SNF fees paid by I&M. Page 17 of the Petition misstates the record when it asserts that once again I&M advanced its preemption argument. Instead, I&M's brief to the Court of Appeals responded to Petitioner's arguments on federal preemption by pointing out that the MPSC did *not* rely on federal preemption. I&M's total argument concerning federal preemption is contained in the following single paragraph:

> "In Part V, MEC sets up another straw man argument concerning federal preemption. I&M admits that it argued to the Commission that disallowance of SNF costs was federally preempted as a federally mandated

> cost. However, the Commission did not rule on those preemption arguments. Instead, the Commission found that I&M had not acted unreasonably or imprudently in its handling of SNF payments. (Order, p 10). The Commission did not determine that it was bound by the doctrine of federal preemption to allow recovery of the costs. Because federal preemption analysis of I&M was not a basis for the Commission's decision in this case, MEC's argument contained in Part V of its brief is really an academic exercise. Matters not addressed and decided by the Commission as a basis for its decision are not ripe for appellate review. Most certainly, MEC's argument does not rise to the level of showing by clear and convincing evidence that the Commission's decision is unlawful or unreasonable [which is the standard for appellate review of an MPSC decision under Michigan law, MCL 462.26(8)]." (Citations omitted).

On April 24, 2007, the Michigan Court of Appeals affirmed the Commission's orders approving I&M's 2004 PSCR plan.

Petitioner spills considerable ink on the issue of preemption, which is perplexing because neither the MPSC nor the Court of Appeals based their decisions on preemption. Rather, the Court of Appeals first applied the proper Michigan standard of review and found that Petitioner failed to meet it.

> "The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden to prove by clear and convincing evidence that the order is unlawful and unreasonable. MCL 462.26(8). To establish that a PSC order it unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. . . . The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular its order denying appellants' petition for rehearing. . . . Appellants have not shown by clear and convincing evidence that the PSC's decision is unlawful or unreasonable." (7a, 10a, 13a).

Petitioner focuses its preemption claims on a single-line statement that federal law mandates the payment of the SNF fee. Petitioner's selective phrasing disguises, but cannot hide the fact that, while the Court of Appeals discussed Petitioner's claims that the MPSC's ratemaking powers were not preempted, the Court did not rely on federal preemption as a basis for its decision.[5] The Court of Appeals determined that

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[5] In fact, a federal preemption issue was not ripe for review because the MPSC did not address the matter. Under Michigan law, matters not addressed and decided by the MPSC as a basis

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the MPSC lawfully acted within its Michigan rate-making authority. The Court responded to Petitioner's claims, noting that the "payment of SNF fees by a utility is mandated by 42 U.S.C. §10222." The Court based its decision, however, on its review of the record and Michigan law, explaining:

> "A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; (2) IMPCo's decision to pay the fees notwithstanding the federal government's delay in completing a disposal site was consistent with action taken by other utilities; (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; and (4) IMPCo had supported litigation to compel the federal government to fulfill its duties under the NWPA.
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> "The PSC has the discretion to consider a variety of factors when setting just and reasonable rates, and the authority granted to the PSC is set out in MCL 460.6a and MCL 460.6j. The PSC acted in accordance with this authority and properly concluded that,

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for its decision are not ripe for appellate review, as I&M noted in the above-quoted paragraph from its brief in the Michigan Court of Appeals.

> in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8)." [12a-13a, Footnotes omitted.]

Petitioner overlooks the above portion of the Court of Appeals' opinion, which plainly sets forth the Court's decision and reasoning. Moreover, Petitioner's arguments ignore that the Court of Appeals followed this portion of its opinion with a footnote expressly declining to address preemption:

> "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. *We need not consider this argument because the PSC did not rely on the doctrine of federal preemption.* Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, *ABATE v. Public Service Comm.*, 192 Mich. App. 19, 22-27; 480 N.W.2d 585 (1981), and, SNF fees paid by IMPCo are mandated by statute, 42 USC §10222(a)(2)." (13a, emphasis added).

Petitioner's disregard for what the Court of Appeals decided – and did not decide – underscores the lack of foundation for the preemption issue that Petitioner attempts to raise before this Court. The

MPSC properly relied on record evidence to find that federal law required I&M to enter into a contract with the DOE, and that I&M acted reasonably and prudently to continue SNF fee payments, notwithstanding the DOE's breach, because, among other reasons, I&M's nuclear plant license renewal, as well as its priority in the future for SNF disposal, would be at risk. The MPSC's and the Court of Appeal's decisions could not be more clear: federal preemption is not at issue in this case, nor was it relied upon at any stage of the proceedings.

Petitioner moved for reconsideration and for correction of the Court's Opinion, both of which were denied on June 7, 2007 (71a-271a). On July 19, 2007, Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court. In its filings with the Michigan Supreme Court, Petitioner pressed its erroneous claims concerning federal preemption in this case. The Michigan Supreme Court denied Petitioner's application (69a-70a), and motion for reconsideration (67a-68a).

REASONS FOR DENYING THE PETITION

I. THE MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN COURT OF APPEALS DECISIONS ARE BASED ON MICHIGAN LAW AND DID NOT DECIDE A FEDERAL PREEMPTION QUESTION.

This case does not present an appropriate vehicle to examine the federal preemption question that Petitioner attempts to raise, because this case was decided on the basis of Michigan law as applied to the evidentiary record before the MPSC. Simply put: there was no federal preemption issue (or other issue with federal law) decided below, so there is no sound basis for this Court to review this case. Supreme Court Rule 10.

The MPSC did not find that it was federally preempted from disallowing I&M's PSCR costs. Nor did the MPSC address Petitioner's claim that no federal preemption interfered with the MPSC's jurisdiction.[6] The MPSC simply found the SNF fee costs incurred by I&M were reasonable and prudent based

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[6] In fact, given that Petitioner asserted to the Michigan Supreme Court that the MPSC was not empowered to decide questions of federal preemption, it is difficult to see how federal preemption could have been an issue at all before the MPSC or the Court of Appeals. Likewise, the question could not have been a major issue before the Court of Appeals because the issue was not necessary to the resolution of the appeal. *Kosmyna v. Botsford Community Hosp.*, 238 Mich. App. 694; 607 N.W.2d 134; *appeal granted* 463 Mich. 906; 618 N.W.2d 905; *appeal dismissed* 630 N.W.2d 331 (1999).

on the evidentiary record and under the standard of Michigan law, 1982 PA 304, MCL 460.6j. Hence, Petitioner's claim that there is a question surrounding federal preemption of the MPSC's jurisdiction with regard to SNF fee costs is unfounded, misleading and incorrect.

The Court of Appeals' opinion does not conflict with the litany of federal court decisions cited by Petitioner. The Court of Appeals applied Michigan law, and therefore did not implicate those federal cases. As noted above, the Court of Appeals did not find the MPSC's ratemaking authority constrained by federal law. Instead, the Court of Appeals properly applied the Michigan standard of review under MCL 462.26, which requires the appealing party to show by clear and satisfactory evidence that the MPSC order is unlawful or unreasonable. The Court of Appeals found that Petitioner did not satisfy this standard. The Court of Appeals determined that the MPSC was entitled to rely on the record evidence (despite Petitioner's conflicting evidence), which showed that the payment of the SNF fee costs was mandated by federal law and by I&M's standard contract with the DOE, and that any failure to make the SNF fee payments risked interest charges and possible loss of I&M's operating license for its nuclear plant. The Court concluded that the MPSC's decision was clearly stated and that Petitioner's claims were unsubstantiated. In sum, the Court found that Petitioner failed to show by clear and satisfactory

evidence that the MPSC decision was unlawful or unreasonable.

With respect to Petitioner's contention that federal law does not preempt the MPSC's ratemaking power over SNF fee costs, the Court of Appeals stated that "we need not consider this argument because the PSC did not rely on the doctrine of federal preemption." (13a). The MPSC simply applied well-established Michigan law in light of the evidentiary record. Neither the MPSC nor the Court of Appeals found the MPSC's authority to be constrained by federal law. Petitioner's reasons this for Court to grant the writ are unfounded.

The Court of Appeals' statement that the SNF fee costs are mandated by 42 U.S.C. §10222(a)(2) is supported in the evidentiary record and the federal law cited.[7] This observation about statutory language (notwithstanding Petitioner's theory that the statute is not enforceable) is not the same as finding federal preemption of the MPSC's ratemaking authority. The Court's observation in Footnote 5 (13a) is also *dicta* because it addressed a question not necessary to the decision. *See*, *Murray v. Menzies Real Homes Co.*, 236 Mich. 77; 210 N.W. 217 (1926). Petitioner disregards the Court of Appeals' clear and unequivocal statement

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[7] 42 U.S.C. §10222(a)(2) states: "For electricity generated by a civilian nuclear reactor and sold on or after the date 90 days after January 7, 1983, the fee shall be equal to 1.0 mill per kilowatt-hour."

that it need not consider Petitioner's preemption argument. Moreover, Petitioner utterly disregards the Court of Appeals' determination that the record showed that I&M's payment of SNF fee costs to the DOE was reasonable and prudent because: (1) payment was required under I&M's standard contract with the DOE; (2) I&M's payment, notwithstanding the DOE's delay, was consistent with action taken by other utilities; (3) if I&M refused to pay the fee, it risked losing its nuclear plant operating license; and (4) I&M had supported litigation to compel the DOE to fulfill its duties (12a). In another portion of its opinion, the Court of Appeals further explained that the MPSC had the discretion (under well-established Michigan law) to weigh the evidence presented on the record, and that Petitioner failed to establish any error:

> "IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich. App. 470, 481; 344 N.W.2d 321 (1983). Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to

> impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.
>
> "The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const 1963, art 6, § 28 and MCL 24.285 is unsubstantiated." (9a-10a).

The MPSC and Court of Appeals' decisions are not based on any federal law question – let alone a significant one. Instead those decisions correctly apply Michigan law in light of a full and clear evidentiary record. There is no merit in Petitioner's contentions that the decisions are contrary to decisions of this Court, the federal Court of Appeals and lower federal courts, since those contentions constructed on Petitioner's misstatements concerning the decisions and the record below. There was no finding of federal preemption, and no further review would be appropriate to decide a purely academic, undeveloped question that would not alter the outcome of this case in any event, since this case was decided based on Michigan law and the evidentiary records. Consequently, because no preemption issue is ripe, Petitioner's contention that the issue presented is of significant national importance likewise affords no basis for this Court to grant the Petition. This is a state-law case that was driven by its facts, so this

case would not be an appropriate vehicle to attempt to address a federal preemption issue with regard to SNF fee payments.

CONCLUSION

The Petition is unfounded, and there is no sound basis to grant it. Therefore, Respondent I&M respectfully requests that the Petition be denied.

Respectfully submitted,

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